

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket No. 02-55
)	
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Services)	ET Docket No. 00-258
)	
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
)	
Petition for Rule Making of UT Starcom, Inc. Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service)	ET Docket No. 95-18
)	
To: The Commission		

PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

The Safety and Frequency Equity Competition Coalition ("SAFE"), an
association of certain non-Nextel EA license holders in the 800 MHz Band,¹ by its attorney,
hereby submits this Petition for Partial Reconsideration and Clarification ("Petition") of the

¹ SAFE members include Coastal SMR Network, LLC; A.R.C., Inc. d/b/a Antenna Rentals Corp.; Skitronics, LLC; Waccamaw Wireless, LLC; and CRSC Holdings, Inc.

Memorandum Opinion and Order (“*MO&O*”)² in the above-captioned proceedings, which, among other things, further modified the rules for the relocation of certain EA licensees in the 800 MHz Band. SAFE seeks partial reconsideration of two economically-harmful inequities remaining in the revised 800 MHz transition plan, which result in arbitrary, capricious and discriminatory treatment of SAFE’s members vis-à-vis other EA licensees relocating to the ESMR band. In addition, SAFE seeks clarification of the meaning of footnote 51 in the *MO&O*, regarding the reimbursement rights of EA licensees for reasonable transactional costs.

I. BACKGROUND

From its inception, SAFE has sought to redress certain fundamental inequities in the initial 800 MHz transition plan adopted in the Commission’s August 6, 2004 *Report and Order* (“*Report and Order*”).³ SAFE has advocated a “level” transition playing field by attacking those features of the transition plan that penalized SAFE’s members. SAFE’s members are EA licensees that seek to relocate in the ESMR⁴ band. Currently, they operate high-site SMR systems with integrated site-specific licenses. These licensees had not yet constructed their high-density cellular systems by November 22, 2004, the effective date of the new rules adopted in the *Report and Order*. The changes adopted in the *MO&O* provided significant relief for SAFE’s members by allowing them to relocate their site-specific licenses along with their EA licenses to the new ESMR band segment, subject to certain qualifying conditions. However, the *MO&O* failed to correct two other significant inequities in the revised transition plan: (1) the

² *Memorandum Opinion and Order*, WT Docket No. 02-55, FCC 05-174, released Oct. 5, 2005, as corrected by *Erratum*, released Nov. 25, 2005, DA-3061.

³ See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, et al., FCC 04-168 (released August 6, 2004).

⁴ SAFE members made initial elections with the 800 MHz Transition Administrator (“TA”) to relocate their systems to the ESMR band. SAFE members intend to confirm those elections in the TA’s current election window.

“unencumbered-White-Space” limitation to be applied to only some non-Nextel EA licenses when they are relocated to the new ESMR band segment; and (2) the limited spectrum credit afforded to certain non-Nextel EA licensees relocating their site-specific licenses to the new ESMR band segment.

II. THE SPECTRUM CREDIT FOR EA LICENSES RELOCATED TO THE ESMR BAND BY SAFE’S MEMBERS SHOULD NOT BE LIMITED TO THE “UNENCUMBERED WHITE AREAS” AS OF NOVEMBER 22, 2004

The Commission’s *Supplemental Order and Order on Reconsideration* dated December 22, 2004 (“*Supplemental Order*”)⁵ modified the *Report and Order*’s criteria for eligibility to relocate EA licenses to the ESMR band segment. The modification states:

We clarify and slightly modify that provision to provide that any non-ESMR EA licensee, whether or not it has constructed facilities, has the option to relocate into the ESMR portion of the band. However, when it does so, it receives only the analog of comparable facilities, the same unencumbered area that it had before it relocated, i.e., its “white area.” We emphasize that the “white area” the non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the “white area” that existed before it relocated and which it had on the date the *800 MHz R&O* was published in the Federal Register. If additional unencumbered area in the EA exists after the non-ESMR EA licensee is relocated, that additional unencumbered “white area” will be available for use by Nextel.⁶

This limitation is arbitrary and capricious and violates the due process protections of the Fifth Amendment to the U.S. Constitution. It has been challenged in a judicial appeal of the *Report and Order*, now pending in the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 04-1413). Without prejudice to any of the legal issues on appeal, SAFE urges

⁵ WT Docket No. 02-55, FCC 04-294, released Dec. 22, 2004.

⁶ *Supplemental Order* at ¶79.

the Commission to reconsider this limitation as a matter of sound, consistent and even-handed policy. The *MO&O* permits SAFE's members to relocate their site-specific licenses along with their EA licenses to the ESMR band segment. That decision implicitly recognized the basic unfairness of penalizing SAFE's members in the transition plan simply because they had not yet constructed their high-density cellular systems as of November 22, 2004.

SAFE's members seek to relocate their systems as a whole to the ESMR band segment and end up in a position comparable to the one they occupied before the transition. Before the transition, SAFE's members were free to remove encumbrances from their EA licenses through negotiations with other licensees that encumbered their EAs. However, as the record of this proceeding reflects, SAFE's members were frozen out of the capital markets by the economic climate following 9/11 and by the adverse impact of the uncertainties of the 800 MHz transition on investor perceptions.⁷ As a result, these EA licensees were unable to construct the high-density cellular systems they intended to construct before the November 22, 2004 deadline – a deadline that was unknown and did not exist until the August 4, 2004 *Report and Order* was released, and was subsequently printed in the Federal Register.

Practically speaking, SAFE's members did not need to clear their EAs of encumbrances until the spectrum uncertainties were resolved and their next-generation high-density cellular systems were capitalized. The Commission now has recognized the unfairness of penalizing these licensees, and has authorized the relocation of their entire systems to the ESMR band. The *MO&O* stated:

On reconsideration, we conclude that by providing EA licensees the opportunity to relocate their associated site-based licenses in conjunction with the EA licenses if they

⁷ See Letter from Performance Industries dated November 30, 2004 (copy attached hereto as Exhibit A), which was attached as Exhibit One to SAFE's Petition for Partial Reconsideration filed on Dec. 22, 2004, and as Exhibit B to the Comments of Coastal SMR Network LLC, filed separately on Dec. 4, 2004.

elect to move to the ESMR band, we are evaluating their systems as a whole (even if portions thereof are licensed on a non EA basis), and we will thereby achieve more effectively the goal of placing these licensees in a position comparable to that they currently occupy.⁸

Unless SAFE's members are granted full credit for their EAs, as nearly all other non-Nextel licensees have received, SAFE's members will be economically harmed, permanently disadvantaged competitively, and deprived of the benefits of the band-clearing options they paid value for in the Commission's spectrum auctions before the transition. In other words, they will suffer significantly diminished value for their EA licenses purchased in Auctions 34 and 36. Part of the price these licensees paid at auction for these EA licenses was for the right to remove the encumbrances – a right the Commission implicitly has taken away from them without compensation or adequate notice. Again, effectively these EA licensees are unjustly penalized by this feature in the transition plan.

In stark contrast to the treatment of SAFE's members, nearly all of the other EA licensees to be relocated to the new ESMR band have received spectrum in the new ESMR band equivalent to, or greater than, their unencumbered EA spectrum in the former band plan, even when their spectrum was in fact encumbered. For example, Nextel received unencumbered spectrum in both the 800 MHz ESMR band and the 1.9 GHz PCS band, even though Nextel's EA licenses were encumbered in the General Category 800 MHz band. The *Report and Order* explicitly recognized these encumbrances in discounting the value of Nextel's 800 MHz spectrum in the economic credit to be given to Nextel toward the additional 1.9 GHz spectrum it received on an exclusive basis:

General Category. The 806-809.75/851-854.75 MHz
General Category band more closely resembles contiguous

⁸ *MO&O* at ¶25.

spectrum than the 800 MHz interleaved band, because it is not divided into interleaved band segments specifically assigned to SMR, public safety, and B/ILT. Instead, the General Category band is segmented into six contiguous twenty-five channel blocks licensed on an EA basis. The vast majority of these EA licenses are held by Nextel. The band is not fully contiguous, because EA licensees must protect grandfathered site-based licenses in the General Category band. Thus, in markets where there are non-Nextel incumbents, Nextel must maintain a seventy-mile spacing for co-channel interference protection, which will likely prevent Nextel from employing that channel in that same market. To account for this circumstance, we discount Nextel's spectrum rights in the General Category by the number of channels that it is prevented from using because of the need to protect co-channel incumbents.⁹

Moreover, non-Nextel EA licensees currently operating ESMR systems, such as Airpeak/Airtel, are entitled to "transfer [EA licenses] on a channel-by-channel basis, such that they have exclusive, incumbent-free, use of the new channels in the EA."¹⁰ In addition, SouthernLINC, as an EA licensee currently operating an ESMR system, has the same relocation options as outlined for Airpeak/Airtel but is subject to a channel exchange agreement between Sprint Nextel for operations in a specially modified ESMR band in the Southeast United States. Thus, SouthernLINC will also be receiving "exclusive, incumbent-free use of the new channels" in the ESMR band.¹¹

III. SAFE'S MEMBERS SHOULD RECEIVE GREATER SPECTRUM CREDIT FOR THEIR SITE-SPECIFIC LICENSES IN THE ESMR BAND

The *MO&O* unfairly limited the amount of spectrum credit that SAFE's members will receive in the ESMR band for each of their site-specific licenses. Without qualification, the

⁹ *Report and Order* at ¶321 (citations omitted).

¹⁰ *Id.* at ¶163.

¹¹ *Id.*

MO&O stated, “We note that any relocated site-based station is limited to the 40 dBuV/m service contour it had as of the Federal Register publication date of the *800 MHz R&O*.”¹² In the same *MO&O*, just paragraphs earlier, however, the Commission adopted a waiver standard for Airpeak and Airtel, which provides them with full credit toward an entire EA for site-specific licenses. The *MO&O* states, “We will allow Airpeak and Airtel to obtain an EA-wide license in the ESMR band for any site-based license or licenses eligible for relocation, provided that it can demonstrate that the 40 dBuV/m contours of the site-based license or licenses cover at least fifty percent of the population within the EA.”¹³ SAFE’s members should be entitled to make a similar waiver showing and receive an EA-wide license in the ESMR band, subject to the same qualifying conditions.

IV. CLARIFICATION REQUEST

SAFE seeks clarification of footnote 51 of the *MO&O*, which states in pertinent part, “If the site-based station is associated with an EA licensee currently operating a non-ESMR system, the EA licensee must pay all expenses associated with relocating site-based stations to the ESMR Band (i.e., hardware, legal, engineering, etc.). . .” This footnote’s use of the word “all” literally could be read to mean that the Commission changed its mind about the previously-adopted reimbursement rights of these licensees for “reasonable transactional costs, such as for legal and engineering fees directly related to determination of comparable spectrum, such as determining channel assignments or ‘white area.’”¹⁴

SAFE believes, in light of the quoted language above from paragraph 79 of the *Supplemental Order*, the footnote should be interpreted to read “if the site-based station is

¹² *MO&O* at ¶25.

¹³ *Id.* at ¶18.

¹⁴ *Supplemental Order* at ¶79.

associated with an EA licensee currently operating a non-ESMR system, the EA licensee must pay all expenses associated with the relocating site-based stations to the ESMR Band, except for reasonable transactional costs as provided for in Paragraph 79 of the Supplemental Order.”

The *Supplemental Order* distinguished between “hardware” costs associated with retuning or replacement of an EA licensee’s physical equipment (discussed in *Supplemental Order* Footnote 196) and “transactional costs” associated with identifying comparable spectrum that will be assigned to an EA licensee (discussed in *Supplemental Order* ¶79). In the case of an ESMR EA licensee that elects to move to the ESMR band, Nextel is to pay both the hardware costs and the transactional costs. In the case of a non-ESMR EA licensee that elects to move to the ESMR band, the EA licensee pays for all of the hardware costs and Nextel pays for reasonable transactional costs.

Footnote 51 of the *MO&O* deals with site-based facilities associated with an EA license. Neither the associated text, nor the footnote itself, changes the basic approach outlined in the *Supplemental Order*. Hardware costs associated with site-based facilities should be treated the same as hardware costs associated with related EA-based facilities were treated in the *Supplemental Order*. Transactional costs should also be treated the same as transactional costs associated with related EA-based facilities were treated in the *Supplemental Order*.

V. CONCLUSION

For the reasons set forth above and in SAFE’s previous pleadings and submissions in this proceeding, SAFE respectfully requests that the Commission: (1) eliminate the “unencumbered white space” limitation, which unfairly restricts the amount of spectrum credit afforded SAFE’s members for the EA licenses relocated to the ESMR band; (2) treat SAFE’s members the same as SouthernLINC, Sprint Nextel, Airpeak and Airtel, regarding the

amount of spectrum credit afforded for their EA licenses that are relocated to the ESMR band;
(3) provide SAFE's members with the same opportunity as Airpeak and Airtel to avoid the reduced spectrum credit of a 40 dBuV/m standard by making a waiver showing to receive an EA-wide license in the ESMR band for site-specific licenses that cover at least fifty percent of the population within the EA; and (4) clarify footnote 51 in the *MO&O* to eliminate unintentional ambiguity and ensure that misinterpretations do not result in controversies over reimbursement claims for reasonable transaction costs by SAFE's members relocating site-specific licenses to the ESMR band.

Respectfully submitted,

SAFETY AND FREQUENCY EQUITY
COMPETITION COALITION ("SAFE")

By:



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Its Attorney

January 27, 2006

ATTACHMENT A

Performance
i n d u s t r i e s , L P
Consulting, Mergers & Acquisitions

November 30, 2004

Mr. Julian Shepard
Williams Mullen
1666 K Street, NW
Suite 1200
Washington, DC 20006

Dear Mr. Shepard,

Pursuant to your request, the following is a summary of Performance Industries' engagement history with John W. Harris relative to his spectrum holdings through A.R.C., Inc., Coastal SMR Network, LLC and CRSC Holdings, Inc.

Background

My client, as noted above, has provided service to the Virginia and North Carolina marketplace for more than 30 years through Specialized Mobile Radio sales and service. In an effort to expand services to the current market, in September 2000, A.R.C., Inc. purchased six blocks of 800 MHz spectrum at Auction 34 in Economic Areas 14, 15, 20, 21, 22 and 25. In December 2000, A.R.C., Inc. purchased 21 additional blocks of 800 MHz spectrum at Auction 36 in Economic Areas 14, 15, 16, 17, 18, 19, 20, 21, 22 and 26.

In March 2001, Performance Industries began providing services to Mr. Harris to expand the market services it was currently providing through the site-based licenses used in the systems of Coastal SMR Network and CRSC Holdings, which included engineering studies relative to the build out of the EA channels as provided in the FCC guidelines allowing permissible operations such as analog or digital services used for voice communications, paging, data and facsimile services. Our engineering studies included the determination of "white space" available in the EAs through 40/22 dBu service/interference contours for each of the frequencies acquired at auction. To further our efforts, Performance Industries' facilitated meetings with Motorola, ComSpace, Central Tech Wireless and others to develop a plan to build out all EAs, including the conversion to a cellular-architecture system via iDen, Harmony or similar technology.

As our engineering, market plan development and system analysis progressed throughout 2001, the unfortunate activities of September 11, 2001 transpired. Following the terrorist attacks of September 11, Nextel issued a White Paper on November 21, 2001 petitioning

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the FCC to realign the 800 MHz land mobile radio band to rectify interference through separation of cellular and non-cellular architectural systems and to allocate additional spectrum to meet critical public safety needs. In March 2002, the FCC responded to Nextel's White Paper with the adoption of a Notice of Proposed Rule Making (NPRM) to explore ways to improve the spectrum environment for public safety operations in the 800 MHz band. During this time, we constructed the EA licenses in an analog format while awaiting clarity from the FCC on its decision and anticipating beginning our expansion plan for a cellular-architecture system.

In September 2002, the Consensus Parties (including Nextel) filed their relocation plan in response to the FCC's NPRM. This plan was further edited through a Supplemental Consensus Plan filed in December 2002. The FCC issued an extension to the original NPRM in January 2003 as a result of the supplemental comments by the Consensus Parties. Again, during this time our client faced uncertainty on the implementation and capital expense relating to building a cellular architecture system until a firm decision was made by the FCC. In April 2004, our client filed comments (attached hereto) urging the Commission to adopt a balanced approach to treat all licensees fairly and allowing for the election of operation in the "cellularized" portion of the band however that is defined.

Summary

Based upon the events of 9/11, the issuance of Nextel's White Paper, and the resulting action by the FCC, our client's plans for the development of a cellular-architecture system were halted pending the FCC's decision on rebanding within 800 MHz. As the decision regarding 800 MHz band reconfiguration has taken nearly 3 years, it is unrealistic to expect the implementation of a cellular system prior to the R&O publication in the Federal Register.

Thank you for your time and consideration. If I can provide additional clarity on this matter, please feel free to contact me.

Regards,

A handwritten signature in dark ink, appearing to read "Daniel C. Hobson". The signature is fluid and cursive, with a large initial "D" and a stylized "H".

Daniel C. Hobson
President

cc: John W. Harris
Attachment

April 8, 2004

Via Email

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.
Washington, DC 20554

Re: A.R.C. Inc.; WT 02-55

Dear Chairman Powell:

A.R.C. Inc. ("ARC"), as a licensee purchased, awarded and operating a network of multiple EA licenses through Auctions 34 and 36, including many site-based licenses within the 800 MHz band, wishes to communicate with urgency that ARC's 800 MHz network must receive nondiscriminatory treatment should the Commission decide to move forward with some form of rebanding in this proceeding. ARC urges the Commission to adopt the following approach:

- ARC must be allowed to operate in the "cellularized" portion of the band however that is defined. If the Commission decides to establish the cellularized band above 861 MHz ARC must be allowed to relocate its operations into this portion of the band.
- ARC and other EA licensees must be allowed to relocate to clear, contiguous spectrum throughout its operating area, either current NPSPAC or upper 200 or a combination thereof.
- The spectrum must be cleared of incumbents with fair treatment and consideration to all EA licensees. ARC and all EA licensees should be treated the same as Nextel.
- The Commission must ensure the "exchange rate" for spectrum for all concerned is non-discriminatory. ARC's spectrum must be counted in the same manner as other parties who would be relocated including Nextel and Nextel Partners. Nextel and Nextel Partners cannot be allowed to trade spectrum on one basis while all other parties are forced to accept replacement spectrum on another, less favorable, basis.

ARC respectfully requests the Commission to take these points into consideration when it moves towards a decision in this important proceeding.

Very truly yours,

A.R.C., INC.

John W. Harris